II. ARGUMENT

GNAPs' Petition must be dismissed because the arbitration provisions of the Act do not apply to section 252(i) "MFN" claims such as those raised by GNAPs.

Although GNAPs attempts to clothe its claims in terms of arbitration of a "negotiated" interconnection agreement, it is clear that it does not want to negotiate an agreement but instead wants to adopt the terms of the MFS Agreement (or the terms it believes that agreement contains) pursuant to section 252(i) of the Act. The arbitration provisions of the Act, however, do not apply to the "opt-in" or MFN procedures set forth in section 252(i). To the contrary, state commissions are directed to arbitrate individual rates according to the standards set forth in the Act, including reciprocal compensation rates.[3] Of course, that is the last thing GNAPs wants, for GNAPs' actual cost of handling Internet calls is a small fraction of the reciprocal compensation rate it seeks, which was intended to cover the costs of transporting and terminating local calls to a large number of end-user customers. That is evidently why GNAPs sought to MFN the MFS agreement rather than negotiate a new agreement. A new agreement would have included rates based on GNAPs' actual costs of transmitting traffic to a few ISPs, not the costs of transporting and terminating calls to numerous end-users.

[3] 47 U.S.C. § 252(d).

GNAPs' position must be rejected, and the Petition dismissed. Nothing in the Act authorizes use of the arbitration procedure in lieu of existing state procedures to determine legal rights under section 252(i). To the contrary, while a carrier may elect either to negotiate and then arbitrate the terms of a new agreement, or to opt into the terms of an existing agreement, the two methods of obtaining an interconnection agreement are mutually exclusive. If the carrier wants the terms of an existing agreement, it takes it under section 252(i). If it wants different terms, it negotiates different terms under section 251 and, if it is unable to get those terms, seeks arbitration under section 252(b). Section 252(b) provides that "the carrier or any other party ***to the negotiation*** may petition a State commission to arbitrate any ***open issues***."[4] When a carrier elects to "opt into" an existing agreement—and each of its terms—under section 252, there is, by definition, no "negotiation," no "open issues," and thus no "party to the negotiation" entitled to seek arbitration nor, indeed, any issues for the state commission to "arbitrate."

The Oregon Commission recognized the incompatibility of section 252(i) requests and requests for arbitration of newly-negotiated agreements when a CLEC carrier, while arbitrating its own agreement, sought to used section 252(i) to adopt the favorable terms contained in another carrier's agreement:

[4] 47 U.S.C. § 252(b) (emphasis added).

> We decline, however, to grant Sprint's request to elect the GTE-AT&T contract in this proceeding. . . . While we conclude that Sprint has the right under section 252(i) to elect another interconnection agreement rather than negotiate one of its own, such a request is beyond the scope of this case. Indeed, to elect the final GTE-AT&T interconnection agreement, Sprint must first withdraw this request for arbitration. This Commission will not simultaneously entertain mutually exclusive competing proceedings . . . .[5]

Dismissal of GNAPs' improperly-filed Petition will not leave carriers seeking resolution of disputes related to section 252(i) without a means of redress. GNAPs' claims could have been brought as a complaint.[6] This is the procedure being followed in *Focal Communications Corporation of Pennsylvania v. Bell Atlantic - Pennsylvania, Inc.*, Docket No. C-00981641, a 252(i) complaint pending before ALJ Smolen. On the other hand, failure to reject GNAPs' improper invocation of the accelerated procedures provided for arbitrations would deprive the Commission and the parties of the orderly adjudication process afforded by the Commission's complaint procedures.

GNAPs' Petition therefore fails to articulate a claim for arbitration and should be dismissed.

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[5] *In re: Sprint Communication Co., L.P.*, ARB 11 Order No. 97-229, slip op. at 3 (Or. PUC June 20, 1997) (copy attached to BA-PA's Answer and New Matter as Attachment 3).

[6] BA-PA does not concede that such a complaint would state a claim for relief and hereby reserves all rights to seek dismissal of such a complaint should one be filed.

III. CONCLUSION

The reason GNAPs has invoked the accelerated procedures for arbitration instead of the Commission's established complaint procedures is clear. As discussed in BA-PA's Answer and New Matter, GNAPs wants a decision before the FCC hands down its anticipated order on circuit-switched Internet traffic. However, by improperly invoking the Act's accelerated arbitration provisions, GNAPs would curtail the time permitted to BA-PA to conduct discovery and to develop its case under the Commission's complaint procedures. GNAPs should not be permitted to short-circuit this Commission's established complaint procedures simply for the opportunity to claim a dubious right to be "grandfathered" after the FCC acts.[7]

[7] As set forth at length in BA-PA's Answer and New Matter, BA-PA's interconnection agreements do not provide reciprocal compensation for Internet calls under ***current*** law. Therefore, "grandfathering" will not help GNAPs in any case.

For all of the foregoing reasons, the Petition should be DISMISSED.

Respectfully submitted,

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DATED: January 11, 1999

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Christopher M. Arfaa
Regulatory Counsel

January 11, 1999

Via Federal Express

James McNulty, Secretary
Pennsylvania Public Utility Commission
North Office Building, Room B-20
North Street and Commonwealth Avenue
Harrisburg, PA 17120

Re: In re: Application of **GLOBAL NAPs SOUTH, INC.** for approval to offer, render, furnish, or supply telecommunications services as a Competitive Local Exchange Carrier to the public with the Commonwealth of Pennsylvania, **Docket No. A-310771**

Dear Mr. McNulty:

I enclose for filing in the referenced matter the original and three copies of Bell Atlantic - Pennsylvania, Inc.'s Amended Answer and New Matter and Amended Motion to Dismiss.

The occasion for the amendments is that, upon further investigation and discussion between counsel precipitated by Judge Weismandel's Telephonic Prehearing Conference, the parties now agree that Petitioner should be deemed to have requested interconnection from BA-PA on July 2, 1998. The enclosed amended pleadings reflect deletion of BA-PA's objection to the Petition on the ground of timeliness. However, BA-PA continues to argue that claims under section 252(i) of the Telecommunications Act are not subject to the Act's arbitration procedures. The Amended Motion to Dismiss restates this argument in slightly greater detail than the original motion.

BA-PA is authorized to represent that counsel for Petitioner does not object to the filing of these amended pleadings *nunc pro tunc*, thus preserving the procedural schedule adopted by for Petitioner's responses to BA-PA's Motion and New Matter.

Please do not hesitate to call me if you have any questions regarding this matter.

Very truly yours,

Christopher M. Arfaa

Enclosures

cc: The Hon. Wayne L. Weismandel (*via Federal Express overnight*)
Christopher Savage, Esq. (*via Federal Express overnight and facsimile transmission*)
Attached Certificate of Service (*via Federal Express overnight*)

CERTIFICATE OF SERVICE

I, Christopher M. Arfaa, hereby certify that I have this day served a true copy of the Amended Answer and New Matter and the Amended Motion to Dismiss of Bell Atlantic - Pennsylvania, Inc., upon the participants listed below in accordance with the requirements of 52 Pa. Code Section 1.54 (related to service by a participant) and 1.55 (related to service upon attorneys).

Dated at Philadelphia, Pennsylvania, this 11th day of January, 1999.

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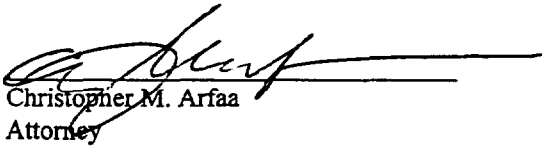

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EXHIBIT 3

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

In re: Petition of Global NAPs South, Inc. for Arbitration of Interconnection Rates, Terms and Conditions and Related Relief	Docket No. A-310771

OPPOSITION TO MOTION TO DISMISS, MOTION FOR SUMMARY JUDGMENT, AND NEW MATTER OF GLOBAL NAPs SOUTH, INC.

Global NAPs South, Inc. ("Global NAPs") hereby respectfully replies to the Motion to Dismiss in this matter filed on January 4, 1999, by Bell Atlantic-Pennsylvania, Inc. ("Bell Atlantic"), as amended on January 11, 1999.[1] As to that motion, Global NAPs' dispute with Bell Atlantic regarding Global NAPs' entitlement to a contract with the same terms and conditions as the MFS agreement is fully arbitrable.

By this same document, Global NAPs respectfully moves that the Administrative Law Judge enter summary judgment in this matter in Global NAPs' favor. Global NAPs submits that it is entitled as a matter of law to an order directing Bell Atlantic to enter into an agreement with Global NAPs on the same terms and conditions as contained in Bell Atlantic's agreement with MFS. No material issues of fact are in dispute, so evidentiary hearings are unnecessary. Indeed, while it appears likely that the parties will have certain disputes about how the contract should be implemented *(e.g.,* whether calls that Bell Atlantic customers make to ISPs served by Global NAPs result in an obligation by Bell Atlantic to compensate Global NAPs under the

[1] As the Administrative Law Judge is aware, on January 11, 1999, Bell Atlantic filed an amended Motion to Dismiss that removed any claim that Global NAPs' petition for arbitration was untimely.

contract), as far as Global NAPs can tell, with one possible exception the parties have no dispute at all about the terms of the contract itself.

The one exception is the question of whether the MFS agreement is properly understood as an agreement that terminates on a date certain (as Bell Atlantic contends) or an agreement with a three-year term (as Global NAPs contends). That issue, however, may be determined by interpreting the MFS agreement itself, and is therefore purely a matter of law.

Global NAPs is prepared to present oral argument on both Bell Atlantic's Motion to Dismiss and on Global NAPs' Motion for Summary Judgment if that would aid the Administrative Law Judge in his decisionmaking.

1. Introduction and Summary.

Bell Atlantic claims that the Commission may not (or should not) arbitrate Global NAPs' request in negotiations — which Bell Atlantic refused — for a contract with the same terms and conditions as the approved contract between MFS and Bell Atlantic. This claim is without merit. During negotiations, a CLEC may demand in good faith any legally available terms and conditions for interconnection with an ILEC. It follows that as part of its negotiations, Global NAPs may demand from Bell Atlantic a contract with the same terms and conditions as contained in the MFS agreement. Bell Atlantic is obliged to accede to that demand for two reasons: (1) Bell Atlantic's general non-discrimination obligations contained in Sections 251(c)(2) and 252(c)(3) and (2) the express provisions of Section 252(i). Bell Atlantic's refusal during negotiations to accept Global NAPs' demand is no less arbitrable than any other failure by an ILEC to accept reasonable and/or legally mandatory terms during negotiations.

Once this erroneous objection to moving forward with this matter is set aside, it is clear that the Administrative Law Judge may properly rule, without any evidentiary hearings, that Bell Atlantic must enter into a contract with Global NAPs on the same terms and conditions as in the MFS Agreement. Bell Atlantic's "substantive" objections to entering into a contract

with Global NAPs relate to how the contract will be implemented once entered into, not whether Global NAPs is entitled to the contract in the first place. Those objections, therefore, do not create material issues of fact in this proceeding.

The only possible exception is the term of the agreement. It would not be inappropriate for the Judge to determine whether that agreement has a fixed termination date or a term of approximately three years. The substantive terms of the MFS Agreement itself show that the only rational way to interpret that contract is as having a three-year term, not a term that ends on a particular date.

2. Global NAPs Has The Right To Demand In Negotiations That It Receive The Same Agreement That MFS Got, And Bell Atlantic's Failure To Comply Is Fully Arbitrable.

Bell Atlantic claims that a CLEC's demand to receive interconnection on the same terms and conditions as the ILEC has already agreed to with a third party is not subject to arbitration. There is no merit to this contention.

Bell Atlantic's argument boils down to the claim that if a CLEC seeks a contract with the same terms and conditions as the ILEC has already entered into with someone else, the CLEC is deprived of the benefit of having a definite 9-month deadline for obtaining a final contract. Nothing in the language of any provision of Section 251 or Section 252 remotely supports such a conclusion. Moreover, such a conclusion is directly contrary to the purpose of Sections 251 and 252, which is to facilitate and speed entry into local exchange markets by new, competitive firms — not to place senseless procedural obstacles in their path.

Far from contradicting or impeding the process of negotiation of interconnection agreements in compliance with the ILEC's duties under Section 251(c), the guaranteed availability of already-approved agreements to all CLECs is a crucial element in setting the context for meaningful negotiations between ILECs and CLECs.

One of an ILEC's key obligations in negotiating with CLECs in nondiscrimination. That obligation is codified, for example, in Sections 251(c)(2) and 251(c)(3). A good argument could be made that these nondiscrimination obligations standing alone would oblige an ILEC to provide any requesting CLEC with a contract containing the same terms and conditions as in any other contract the ILEC has entered into.

Any doubt on that score, however, is completely eliminated by the express terms of Sections 251(c)(1), 251(c)(2) and 251(c)(3). Those sections specifically require that the ILEC, in negotiating in good faith, in providing interconnection arrangements, and in providing access to unbundled network elements, act (*inter alia*) in accordance with the requirements of "Section 252."

Now, "Section 252" is not an obscure or ambiguous term. It means what it says, and plainly includes Section 252(i). It follows that the ILECs' obligation to negotiate in good faith under Section 251(c)(1) ***includes*** compliance with Section 252(i); that its obligation to offer interconnection for the exchange of telecommunications under Section 251(c)(2) ***includes*** compliance with Section 252(i), and that its obligation to make unbundled network elements available under Section 251(c)(3) ***includes*** compliance with Section 252(i).[2]

What this means is that, in every negotiation between an ILEC and a CLEC, pre-existing contracts between the ILEC and other CLECs are "on the table" at all times, as a matter of law. It is simply not legally permissible for an ILEC to refuse a CLEC access ***during negotiations*** to the terms of any pre-existing contract. If an ILEC does so (as Bell Atlantic has here), the ILEC is guilty not only of bad faith negotiations, but also of unfairly discriminating against the affected CLEC. If an ILEC does so, therefore, it is violating not only Section 252(i) directly, but also its duties under Section 251(c).

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[2] In this regard, note that just as Sections 251(c)(2) and 251(c)(3) expressly refer to Section 252(i), Section 252(i) expressly refers to interconnection arrangements and availability of unbundled network elements. The direct linkage between an ILEC's duties under Section 251(c) — compliance with which is plainly an arbitrable issue — and CLEC "opt in" rights under Section 252(i) could hardly be clearer.

It follows that a CLEC may demand the terms of an already-existing agreement, during negotiations, as an alternative to whatever the ILEC's otherwise "best" offer might be. If the ILEC does not comply, that creates an arbitrable issue in exactly the same way that an ILEC's refusal to abide by any other legal interconnection obligation would create an arbitrable issue.[3] The arbitrable issue created by Bell Atlantic's failure to abide by Section 252(i), therefore, is simply whether Global NAPs is entitled to the same contract that Bell Atlantic has entered into with MFS.

This is not to say that Section 252(i) does not also entitle a CLEC — directly and without negotiation — to demand an already-approved agreement. Global NAPs believes that Section 252(i) operates independently in this regard as well. And it may well be, as suggested during the recent telephonic pre-hearing conference, that a CLEC may file a complaint against the ILEC, without invoking either negotiations or arbitration procedures, if the ILEC refuses to fulfill its duty. As explained below, however, nothing about the language of, or policy behind, Section 252(i) and the negotiation process suggest that the two routes to an agreement are, or should be, mutually exclusive.

First, the entire purpose of Sections 251 and 252 is to allow a speedy and efficient mechanism for CLECs to enter the ILEC's monopoly preserve, so as to begin to break down the ILEC's monopoly by means of head-to-head competition.

Second, the function of the negotiation process (subject to regulatory supervision via arbitration proceedings), including the 9-month deadline, is to ensure that the process does

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[3] For example, the FCC has held that ILECs must offer local loops as an unbundled network element under Section 251(c)(3). Suppose an ILEC simply declared in negotiations that its loops were not available for unbundling. That failure to meet its legal obligations would be subject to arbitration, even though it would require nothing more than reference to the relevant FCC ruling to conclude that the CLEC was right and the ILEC was wrong. So it is here. As described below, it does not require any factual analysis to determine that Bell Atlantic has violated its duties under Sections 251(c)(1), (c)(2) and (c)(3) in denying Global NAPs interconnection on the same terms and conditions as contained in its contract with MFS. But that does not make Bell Atlantic's refusal to honor its legal obligations any less arbitrable.

not take too long. Congress recognized the simple fact that delay serves no one's interest except the monopolist's, and wanted to craft a system that would frustrate efforts by incumbent LEC monopolists to generate such delay.

Third, the function of Section 252(i)'s "most favored nation" provision is to allow CLECs to build on the negotiating results of other CLECs, so that there is no need for each CLEC to "reinvent the wheel" in negotiations. If a CLEC can see that an existing agreement will suit its needs perfectly well, it can avoid negotiations entirely by selecting and existing agreement as its own.

Clearly, however, Section 252(i) is not intended to discourage a CLEC from trying to negotiate a deal that is actually well-suited to its needs. But that would be the direct result of adopting Bell Atlantic's view. Bell Atlantic essentially wants the Administrative Law Judge to hold a CLEC that attempts to negotiate a customized deal with the ILEC, then (in effect) throws in the towel because it is not getting any better deal (from its perspective) than is already available, cannot simply ***demand as part of the negotiations*** that the ILEC honor its 252(i) rights. Instead, as Bell Atlantic would have it, the CLEC automatically sacrifices the benefit of the statutory 9-month deadline by simply demanding that the ILEC comply with Sections 251(c)(1), 251(c)(2), and 251(c)3) — each of which expressly requires that the ILEC abide by Section 252 — and with Section 252(i) directly.[4]

There is not a shred of statutory language, and certainly no sound, pro-competitive public policy, that could remotely support such a result. Consequently, Bell Atlantic is asking the Judge in this case to read into the pro-competitive Telecommunications Act of 1996 a special limitation on CLEC negotiation rights that is found nowhere in the law itself or the legislative

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[4] This illustrates why the case from Oregon cited by Bell Atlantic is utterly irrelevant. In that case a CLEC negotiated for a particular set of contract terms and, when the negotiations failed, arbitrated its disputes with the ILEC. ***After the arbitration award***, the CLEC wanted to exercise its 252(i) rights to "opt in" to an agreement substantially different from the one that the state regulator had just ordered established in the arbitration. Here, by contrast, as part of the negotiations and prior to filing for arbitration, Global NAPs requested a contract on the same terms and conditions as the contract between Bell Atlantic and MFS.

history. In light of the overriding pro-competitive purpose of the Act — that is, a purpose of aiding CLECs in their efforts to erode historical ILEC monopolies — it would be plain error to graft such a hidden limitation on CLEC rights onto the statute.

For these reasons, the Judge should reject Bell Atlantic's invitation to commit plain legal error and, instead, deny the Motion to Dismiss.

3. The Judge May Properly Rule Without Any Evidentiary Hearings That Global NAPs Is Entitled To Adopt The MFS Agreement As Written And Approved By The Commission.

All Global NAPs wants is the same deal that MFS got, and Bell Atlantic has no credible grounds on which to deny Global NAPs that deal.

Bell Atlantic raises various speculative concerns that Global NAPs will not honor the terms of the MFS deal. But those concerns go to the implementation of the agreement, not Global NAPs' right to enter into the agreement in the first place. Its speculations about Global NAPs' business plans; its ramblings about what the FCC meant in the *GTE ADSL Order*; and its vague innuendoes about what might happen to NXX code usage if Global NAPs is permitted to enter the market[5] — essentially all of Bell Atlantic's submission on the merits in response to Global NAPs' petition — have nothing at all to do with whether Global NAPs is entitled to the same contract that Bell Atlantic has with MFS. Instead, Bell Atlantic's arguments all boil down to their view of what the parties to that contract either may or may not do ***once it has been entered into.***

Global NAPs submits that every one of those issues is a proper subject for discussion between the parties to the contract once it has been entered into, and to adjudication by the Commission in a complaint case if the parties cannot resolve any actual differences of opinion that arise. We note a few of the major points below to illustrate that this is, indeed, the case.

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[5] *See* Bell Atlantic's Answer and New Matter at 1-9 and *passim*.

Reciprocal Compensation Rates: Bell Atlantic claims that the reciprocal compensation rates contained in the MFS agreement have been superseded as a matter of law by lower rates established in a generic Commission proceeding. But this issue will not arise until after Global NAPs and Bell Atlantic are exchanging traffic and one of the parties sends the other party a bill. If at that time there is a dispute about the appropriate per-minute rate, the parties may be able to resolve it by private negotiation, as contemplated by the agreement. If not, they can bring the dispute to the Commission, which will be able to speak authoritatively about whether it meant to supersede the earlier rates or not.

Payment for Calls to ISPs: Bell Atlantic claims that even if it was required under the original MFS agreement to pay compensation in connection with calls to ISPs, that requirement has been superseded by recent FCC action. But this issue, too, will not actually arise until after the agreement is effective, the parties are exchanging traffic, and one of them (presumably Global NAPs) sends the other (presumably Bell Atlantic) a bill that includes terminating calls to ISPs. If at that time the parties still disagree (and they might not, depending on whether the FCC has spoken on the issue by then), again, they can attempt to resolve the matter through private negotiations and bring the matter to the Commission for resolution if those private negotiations fail.

Assignment of NXX Codes: Bell Atlantic claims that Global NAPs will assign numbers within NXX codes to ISP customers in a manner that inefficiently uses the NXX codes and deprives Bell Atlantic of toll revenues to which it is otherwise entitled. Plainly, this, too is an issue that relates entirely to the ***implementation*** of the contract, not whether Global NAPs is entitled to enter into it. At this (premature) juncture, Global NAPs would only note that the assignment of NXX codes is the responsibility of Lockheed-Martin (the nationwide numbering resources administrator), not Bell Atlantic, so it is not for Bell Atlantic to say what NXX usage practices are and are not appropriate.

All that said, there is one issue that could reasonably be arbitrated at this time: did MFS get a deal that ends on a date certain, or did MFS get a three-year deal? Even that question

3. Ongoing "Mirroring" Of Unrelated Future Changes. GNAPs has reviewed several of the "agreements approved" by the Pennsylvania PUC and concluded that the MFS agreement would suit its needs. BA, however, will not permit GNAPs to enter into a binding contract that reflects the terms of the MFS Agreement. Instead, BA is demanding that GNAPs agree, sight unseen, to accept any changes in the MFS agreement that BA might subsequently negotiate ***with MFS***, independent of GNAPs.

BA apparently believes that an "opted into" agreement under Section 252(i) of the Act is somehow merely an appendage of the original agreement that provides the terms and conditions being opted in to. The analysis, however, ignores the plain meaning of Section 252(i). GNAPs is entitled to the same terms and conditions that ***this Commission*** approved for MFS. MFS is not subject to having its contract with BA revised as a result of dealings by unrelated third parties, and GNAPs should not be subjected to such a condition either. Moreover, as noted above, there is an intimate relationship between the provisions of Section 252(i) and BA's non-discrimination obligations in the various subsections of Section 251(c). GNAPs has proposed to BA ***as part of the negotiations*** that GNAPs receive the same terms and conditions as BA provided to MFS, as required by Section

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> connection, rather than a circuit-switched, dial-up connection to ISPs and potentially other locations. ... This Order ***does not consider or address*** issues regarding whether [LECs] are entitled to receive reciprocal compensation when they deliver to information service providers, including Internet service providers, circuit-switched dial-up traffic originated by interconnecting LECs. ... [W]e find that this Order ***does not, and cannot, determine whether reciprocal compensation is owed,*** on either a retrospective or a prospective basis, pursuant to existing interconnection agreements, ***state arbitration decisions,*** and federal court decisions.

GTE ADSL Order at " 2 (emphasis added). The FCC recently reaffirmed the irrelevance of the jurisdictional analysis of a dedicated ADSL service provided by one carrier to the reciprocal compensation issue in Bell Atlantic Telephone Cos. *et al., Memorandum Opinion and Order*, CC Docket Nos. 98-168 *et al.* (released November 30, 1998) at " 2. In the *Bell Atlantic* case, the FCC again stated that its order did not "consider or address" issues relating to reciprocal compensation. In light of these FCC statements, GNAPs believes that it constitutes bad faith negotiation in violation of Section 251(c)(1) for BA to assert that this FCC ruling affects the proper legal and jurisdictional analysis of switched, dial-up calls to ISPs.

252(i) of the Act. BA's rejection of this proposal on any basis is highly questionable; but in the specific context of the "mirroring" suggestion, BA is attempting to ignore the fact that GNAPs has independent status as a "requesting telecommunications carrier" under ***both*** Section 251(c) (all relevant subsections) ***and*** Section 252(i).

In short, while MFS and BA are free to renegotiate any way they see fit, GNAPs is entitled to interconnect with BA on the terms and conditions contained in the agreement approved by this Commission. If MFS and BA subsequently negotiate a modification to that agreement which is later approved by the regulators, then Section 252(i) gives GNAPs the option to "opt in" to that subsequent, modified agreement as well. It does not, however, require GNAPs to do so.

4 **Deprivation Of Equivalent Contract Term.** BA will not give GNAPs the same three-year contract term that it gave MFS (*i.e.*, a contract that will remain in effect for a period of approximately three years from the date of execution to the date of expiration). Instead, BA insists that its agreement with GNAPs be ***co-terminous*** with the MFS agreement (*i.e.*, a contract that will expire in a matter of months, co-terminous with the expiration of the MFS agreement). Numerous specific provisions of the MFS agreement, however, plainly contemplate that the agreement will extend for a period of several years from the date of execution, and, indeed, critical benefits of the agreement are simply not obtainable if "new" versions of the agreement terminate on the same calendar date (July 1, 1999) as the MFS Agreement.

BA's position is a clear misreading of Section 252(i) of the Act, even as interpreted by the 8th Circuit Court of Appeals. In a capital-intensive business like telecommunications, it is critical that market participants have reasonable certainty of the terms under which they will operate in order to justify the substantial capital expenditures required to operate at all. The term of an interconnection contract, therefore, is clearly a material aspect of "the terms and conditions of" an existing agreement, considered "as a whole." *See Iowa Utilities Board, supra*, at 800. BA's position would deprive firms such as GNAPs, seeking to take advantage of the entirety of an agreement, from one of the key benefits of a multi-year contract: the very stability and predictability that the original contractor

negotiated for in establishing a multi-year term.

This BA condition (aside from violating Section 252(i)) is also discriminatory in violation of Sections 251(c)(2) and 251(c)(3) of the Act. MFS, under its agreement, gets the benefit of a stable three-year contract. GNAPs, by contrast, would get the "benefit" of a contract that expires in less than a year.

BA has claimed that if the MFS agreement is not interpreted as terminating on a certain date, BA will be forever subject to the same agreement as one CLEC after another "opts in" to the original agreement. This claim is wrong. The reason that the MFS agreement is available for "opting in" to in the first place is that this Commission has affirmatively found that it is consistent with the public interest and does not discriminate against any carrier, under the terms of Section 252(e)(2)(A) of the Act. As long as that ruling remains in effect, there is no reason to forbid other CLECs from opting in to the agreement's terms.

This also shows why BA would not be subject to the terms of the MFS agreement forever. If circumstances have changed in some material way so that the terms of the MFS agreement are no longer in the public interest, BA is free to present those changed circumstances to the Commission and to seek a ruling to that effect. Assuming that BA could so persuade the Commission, it would no longer be possible for any CLEC to "opt in" to that agreement.

III. OTHER ISSUES DISCUSSED AND RESOLVED BY THE PARTIES (Section 252(b)(2)(A)(iii))

With the exception of the issues set out above, GNAPs is aware of no other outstanding issues regarding interconnection.

IV. RELIEF REQUESTED

For all the foregoing reasons, GNAPs respectfully requests:

1. That the Commission arbitrate the unresolved interconnection issues between GNAPs and BA described in Section II above, and that such arbitration be conducted on an expedited basis with reasonable limitations on procedures (e.g., discovery), timing, hearing dates and arbitration expenses to be incurred by the parties;

2. That in rendering its decision regarding such arbitration, the Commission accept the positions of GNAPs reflected in Section II;

3. That the Commission direct BA to articulate clearly an interconnection offering to GNAPs and compel BA pursuant to Section 252(b)(4)(B) of the Act to provide to GNAPs any and all relevant information regarding the unresolved interconnection issues;

4. That, in order to effectuate the competition sought under the Act, the Commission direct BA to enter into an interconnection agreement with GNAPs immediately upon the conclusion of such arbitration and that, while such arbitration is pending, the Commission direct BA promptly to provide GNAPs with interconnection on an interim basis on terms consistent with those provided to other competitive local exchange carriers in Pennsylvania; and

5. That the Commission accord GNAPs such other relief as it deems it necessary or appropriate.

Respectfully submitted,

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Of Counsel

Date: December 8. 1998

EXHIBIT 2

BEFORE THE
PENNSYLVANIA PUBLIC UTILITY COMMISSION

In re:	:	
Petition of GLOBAL NAPs, SOUTH, INC.	:	
for Arbitration of Interconnection Rates,	:	
Terms, and Conditions, and Related Relief	:	Docket No. A-310771

AMENDED
MOTION TO DISMISS OF
BELL ATLANTIC - PENNSYLVANIA, INC.

Pursuant to 52 Pa. Code § 5.101, Bell Atlantic - Pennsylvania, Inc. ("BA-PA") hereby moves to dismiss the Petition of Global NAPs, South, Inc. ("GNAPs") for Arbitration of Interconnection rates, Terms, and Conditions, and Related Relief (the "Petition").

I. INTRODUCTION

GNAPs' Petition should be rejected for the many substantive grounds set forth in BA-PA's Answer and New Matter. However, a fundamental legal defect precludes a decision on the merits: GNAPs' claims are asserted under section 252(i) of the Telecommunications Act of 1996 (the "Telecommunications Act" or the "Act").[1] Such claims do not fall within the arbitration provisions of the Act.[2]

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[1] 47 U.S.C. § 252(i). The Telecommunications Act of 1996 amended the federal Communications Act and thus is codified at scattered sections of title 47, U.S.C. References to sections of the Telecommunications Act are references to the Communications Act, as amended.

[2] 47 U.S.C. §§ 252(b), (c), (d).